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**Important Information**

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

VID 1400/2025

**AUSTRALIAN CONSERVATION FOUNDATION INC.**
Applicant

and

**MINISTER FOR ENVIRONMENT AND WATER**
First Respondent

**WOODSIDE ENERGY LTD**
Second Respondent

# OUTLINE OF SUBMISSIONS OF THE SECOND RESPONDENT IN RESPONSE TO INTERLOCUTORY APPLICATION TO BE HEARD AS *AMICUS CURIAE*[1]

## A. OVERVIEW

1. By interlocutory applications dated 13 November 2025, Astrid Puentes Riaño – in her capacity as United Nations Special Rapporteur on the human right to a clean, healthy and sustainable environment (the **Special Rapporteur**) – has applied to be heard as amicus curiae in VID 1356/2025, VID 1357/2025 and VID 1400/2025.

2. Leave should not be granted. The Special Rapporteur's proposed submissions will not significantly assist the Court beyond the submissions made by the applicants in the proceedings, and the consequential costs and delay would be disproportionate to that expected assistance. That would be so for any grant of leave but would be particularly acute if leave were granted to the Special Rapporteur to make oral submissions.

## B. LEGAL PRINCIPLES

3. The Special Rapporteur has applied for leave under r 9.12 of the *Federal Court Rules 2011* (Cth). In determining the application, the Court may have regard to:

   (a) whether the amicus's contribution will be useful and different from the contribution of the parties to the proceeding; and

[1] These submissions address the Special Rapporteur's interlocutory applications in each of VID 1356/2025, VID 1357/2025 and VID 1400/2025 and have been filed in identical form in each of those proceedings.

(b) whether the intervention might unreasonably interfere with the ability of the parties to conduct the proceeding as the parties wish; and

(c) any other matter that the Court considers relevant.

4. As the Special Rapporteur identifies, the Court would need to be satisfied that it would be significantly assisted by the submissions of the proposed amicus and that any cost or delay caused by the court agreeing to hear the proposed amicus would not be disproportionate to the expected assistance.[2] Further, a proposed amicus should only be heard to the extent that their submissions do not "duplicate the submissions of a party".[3] The role of an amicus is normally "confined to assisting the court in its task of resolving the issues tendered by the parties by drawing attention to some aspect of the case which might otherwise be overlooked".[4]

## C. APPLICATION OF PRINCIPLES IN THIS CASE

5. The Special Rapporteur seeks to make submissions on three topics. Each is addressed in turn below, focusing on the main matter on which the Special Rapporteur seeks to be heard: the proper construction of the phrase "substantial cause" in s 527E of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **Act**), with a particular focus on what is submitted to be its "international law context".[5]

### C1. The "substantial cause" argument

6. The Special Rapporteur seeks to make submissions directed to ground 4 of proceeding VID 1356/2025 and the sole ground in proceeding VID 1400/2025. By those grounds, the ACF contends that the phrase "substantial cause" in s 527E has a "qualitative" meaning and the Minister erred in applying nothing more than an arithmetical analysis. Both grounds depend upon a disputed reading of the Minister's reasons. The construction issue only arises on the ACF's reading.

7. The thrust of the Special Rapporteur's proposed submissions is that a "quantitative" approach to the word "substantial" is inconsistent with statements in the International

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2 ***Roadshow Films*** *Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [4] (emphasis added). The test was recently restated by the Federal Court in *Australian Securities and Investments Commission v RAMS Financial Group Pty Ltd* [2025] FCA 1087 at [12] (Shariff J).

3 *Roadshow Films* (2011) 248 CLR 37 at [7] (the Court).

4 *Bropho v Tickner* (1993) 40 FCR 165 at 172 (Wilcox J).

5 Submissions in Support of Application at [1]. This issue arises in proceeding VID 1356/2025 (ground 4) and proceeding VID 1400/2025 (ground 1).

Court of Justice's Advisory Opinion on the Obligations of States in Respect of Climate Change (**Advisory Opinion**) given on 23 July 2025, and that an interpretation of s 527E that is consistent with those statements should be preferred.[6]

8. In both VID 1356/2025 and VID 1400/2025, the ACF relies on several factors in support of the construction it advances. One of them is submitted to be that an interpretation of the phrase "substantial cause" in s 527E that accords with Australia's international obligations with respect to climate change, particularly as stated in the Advisory Opinion, ought to be preferred.[7] It relies on statements in the Advisory Opinion concerning the obligations of States to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, including statements with respect to environmental assessments and approvals for "particularly significant proposed individual activities contributing to GHG emissions".

9. That is the same as the argument that the Special Rapporteur seeks to advance, which is to the effect that "the ICJ Advisory Opinion assists in resolving the ambiguity in 'substantial cause'".[8] While the Special Rapporteur extracts a greater number of passages from the Advisory Opinion, including in a lengthy Annexure to the submissions,[9] the point that is made is the same. The repetition of this point does not "significantly assist" the Court. In *Wurridjal v The Commonwealth*,[10] a majority of the High Court refused leave to amici curiae to make written submissions in similar circumstances, with French CJ stating that:[11]

> In the present case, the Court has received a large volume of material said to support the proposition that the rights claimed by the plaintiffs constitute property for the purposes of s 51(xxxi) of the Constitution. The material consists of what are said to be relevant international law instruments and international jurisprudence. The submissions do not travel significantly beyond that contention and some general statements about the wide meaning to be given to the word "property" in s 51(xxxi). They do not show how, having regard to the particular statutory framework in which

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6 Proposed Submissions at [40].

7 See paragraphs [222]–[223] of the applicant's submissions in VID 1356/2025 and paragraph [6] of the applicant's submissions in VID 1400/2025.

8 Proposed Submissions at [40]–[43].

9 The Annexure pulls out "climate change-related" obligations identified in the Advisory Opinion, with references to the parts of the Advisory Opinion where they were discussed, sometimes including some paraphrasing of what the obligation is and what the International Court of Justice said the obligation means with respect to climate change.

10 (2009) 237 CLR 309.

11 *Wurridjal v the Commonwealth* (2009) 237 CLR 309 at 312-313.

> the plaintiff's property rights arise and the operation of the impugned laws, the material is of any relevance. Before the Court will accept the offer of assistance of an amicus curiae it must be satisfied that it will be assisted. The tender of a large amount of material, supported by what is little more than an assertion about its utility, is not sufficient to give to the tenderer a voice in these proceedings.

10. The fact of repetition is not altered by the "subject matter expertise and experience" of the Special Rapporteur or the position occupied by her.[12] Her proposed involvement in the proceeding is not as an expert and no submission is proposed to be made about the Advisory Opinion by reference to her expertise. Her particular role as an independent human rights expert means that the position she proposes to take and the submissions she proposes to make are not on behalf of the United Nations or its organs.[13] In addition, the relevance and impact (if any) of the Advisory Opinion on the proper construction of s 527E is a matter of Australian law and she proposes to make submissions about Australian law issues and Minister's reasons. The ACF is equally well placed make submissions about all relevant matters.

11. In ***Blasket Renewable*** *Investments LLC v Kingdom of Spain*,[14] the Federal Court rejected an application by the European Commission to intervene in the proceeding so that it could make submissions on European Union law. The Court said, relevantly, that the Commission's proposed contribution would not be "useful and different" for the purposes of r 9.12(a), notwithstanding the Commission's status as the external representative of the European Union, because its proposed submissions did not add anything to those of the parties.[15] The question therefore remains whether the content of the proposed contribution adds anything to the parties' cases, and the Special Rapporteur's proposed submissions do not do so.

12. Moreover, the Special Rapporteur's expertise[16] is in the area of human rights, and in particular "human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment".[17] The international and domestic court cases in which

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12 Submissions in Support of Application at [10]; Proposed Submissions at [3].
13 Affidavit of David Burke dated 27 April 2026 at [3]–[8].
14 [2025] FCA 1028.
15 See *Blasket Renewable* [2025] FCA 1028 at [351]–[361] (Stewart J).
16 See the United Nations Human Rights Council Resolution that established her mandate: Annexure DB-1 to the Affidavit of David Burke dated 13 November 2025.
17 Annexure DB-1 to the Affidavit of David Burke dated 13 November 2025 at 13.

she has sought leave to be heard or made submissions,[18] were brought under human rights treaties or otherwise concerned or involved human rights.[19] The Special Rapporteur is not seeking, for example, to bring to this Court's attention a body of human rights jurisprudence, relevant to the issue of the construction of the Act, of which the Court would otherwise not be aware.

13. It might be said that the Special Rapporteur's proposed submissions about s 527E provide more detail than the ACF's submissions in referring to certain international legal obligations and principles. However, the Special Rapporteur's proposed submissions on each of those obligations and principles is derived substantially from the Advisory Opinion, on which the ACF already relies. These submissions therefore do not add anything to the ACF's submissions. The proposed submissions also refer to the Paris Agreement. It is not expressly mentioned in the ACF's submissions but forms part of the basis of statements in the Advisory Opinion that are referred to and must be implicitly relied on as a basis for the submissions that the ACF makes. Putting to one side the issue of the Paris Agreement postdating the enactment of s 527E,[20] and the recognition by the Special Rapporteur that the Act was not enacted to give effect to Australia's international climate treaty obligations,[21] these are cursory submissions to the same end as the ACF's submissions.

**C2. The "s 137A" argument**

14. The Special Rapporteur seeks to make submissions directed to ground 6 of proceeding VID 1357/2025.[22] The Court has made orders that the hearing currently scheduled in July 2026 be limited, with respect to that ground, to the question whether: "On the proper construction of s 137A of [the Act], is a question of whether the Minister acted inconsistently with the National Heritage Management principles a question of objective fact for the Court to determine based on the admissible evidence before the Court?"[23] The Special Rapporteur does not seek to make submissions on that

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18 See the cases referred to at paragraphs [14] and [20] of the Affidavit of David Burke dated 13 November 2025 and paragraph [14] of the Affidavit of David Burke dated 27 April 2026.

19 For example, the two domestic cases to which the Special Rapporteur refers at [20] of the Affidavit of David Burke dated 13 November 2025 were in jurisdictions whose constitutions enshrine a right to a healthy environment.

20 Proposed Submissions at [46].

21 Proposed Submissions at [20] and [46].

22 See Proposed Submissions at [50]–[54].

23 Orders of the Honourable Justice Button dated 12 March 2026.

question.[24] The Special Rapporteur seeks to make submissions that will only become relevant if that question is answered "yes". Those submissions are premature and leave should not be given for the Special Rapporteur to be heard on this point.

15. To the extent that the Special Rapporteur's proposed submissions on this point are directed to ground 7 of proceeding VID 1357/2025,[25] the limited submissions, which again rely on statements in the Advisory Opinion, do not "significantly assist" in the resolution of that ground. Ground 7 is directed towards the standard of satisfaction required of the Minister by the Act, which is a matter of statutory construction. The Special Rapporteur accepts that National Heritage management principles do not derive from any international treaty obligation.[26] She does not explain how or why the Advisory Opinion bears on the required standard of satisfaction. Nor does the Special Rapporteur explain how her proposed submissions on a statutory provision concerned with National Heritage connect to her position and expertise.

**C3. The "s 134(1)" argument**

16. The Special Rapporteur also seeks to make submissions directed to ground 3 of proceeding VID 1356/2025 and grounds 3–5 of proceeding VID 1357/2025, all of which concern the power in s 134(1) of the Act for the Minister to attach conditions to the approval of an action.[27] She describes these as submissions directed towards "the adequacy of the conditions".[28] These proposed submissions do not significantly assist the Court. They refer predominantly to ordinary matters of statutory construction, on which the applicants are already in a position to assist the Court. To the extent that these proposed submissions refer also to Australia's international legal obligations, they do not explain the relevance of those obligations beyond an assertion that international law requires that the power conferred by s 134(1) must operate in a particular way.

**C4. Interference**

17. A grant of leave would interfere with the conduct of the proceedings by the parties, and, having regard to the submissions at 6 to 16 above, would be disproportionate to any assistance that the Special Rapporteur might provide.

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24 Proposed Submissions at [50].
25 See Proposed Submissions at [55].
26 Proposed Submissions at [51].
27 See Proposed Submissions at [56]–[59].
28 Proposed Submissions at [24].

18. Since the commencement of the proceedings and since the Special Rapporteur made her applications, the grounds of challenge have expanded substantially in both number and character. The volume of material likely to be placed before the Court in respect of them is likely to include documents taken from extensive decision briefs (and in proceeding VID 1356/2025 documents obtained through freedom of information requests). It is likely to be very substantial.

19. In proceeding VID 1356/2025, the applicant's submissions exceed 100 pages. In VID 1357/2025, the applicant's submissions exceed 70 pages including an Annexure. These are already very lengthy submissions for judicial review proceedings. The Special Rapporteur's proposed submissions including the Annexure would add a further 33 pages, most of which is devoted to the single issue of construction of "substantial cause". As an example of the additional work required to respond to the proposed submissions, the Annexure's "summaries of the climate change-related international law obligations identified by the ICJ" would need to be carefully reviewed for accuracy, which would take a significant amount of time.

20. Importantly, the construction of the provisions at issue (including, in particular, s 527E) requires a focus on the ordinary meaning of the text of the provision, understood in its statutory context, having regard to the objects and purposes of the legislation.[29] The ACF has addressed the construction argument in its submissions and, as discussed above, has also addressed the further (asserted) relevance of international law. That potential factor in the construction task ought not be allowed without sufficient justification to divert resources in the proceeding. The relevance of Australia's suggested customary law international obligations to the interpretation of the phrase "substantial cause" in s 527E of the Act is one, confined, aspect of just two of the 13 grounds of judicial review at issue in the proceedings.

21. The consequences for the parties (in terms of costs, potential delay, and the conduct of the proceeding generally) of having to respond to the Special Rapporteur's proposed submissions is disproportionate to the limited assistance that she can provide on each of the three matters addressed in the proposed submissions and, in particular, to the interpretation of s 527E.

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[29] See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).

## D. ALTERNATIVE POSITION

22. In the alternative, if the Special Rapporteur is given leave to be heard as amicus curiae, that grant of leave should be confined to the filing of written submissions in the form annexed at DB-7 to the Affidavit of David Burke dated 27 April 2026.

23. In deciding whether to grant leave, the Court should have regard to any disruption that might be caused to the proceeding, including any delay consequent on agreeing to hear the proposed amicus. Between them, the four parties who have an interest in the proceedings can already be expected to make submissions about a range of issues which include the proper construction of the Act, the Minister's reasons and reasoning process, the basis of aspects of Minister's decision and an allegation of apprehended bias. Should the Special Rapporteur be granted leave to make oral submissions, there is a real chance that there will not be adequate time for the parties to present their cases fully in the time set aside for hearing, having regard in particular to the length and content of the proposed written submissions that the Special Rapporteur has provided.

24. Even if the Court is satisfied that it would be "significantly assisted" by the Special Rapporteur's written submissions on this point, a grant of leave that extends to oral submissions cannot be justified in this case.

**Date: 4 May 2025**

**D G Clothier** **F I Gordon** **J D Watson** **G R Clough**